RECORD AND BRIEF

No. 16-980

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In The Supreme Court of the United States

JON HUSTED, Ohio Secretary of State,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF GEORGIA AND 14 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Georgia and the other amici States—Alaska, Idaho, Kansas, Louisiana, Michigan, Missouri, Montana, Nevada, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia—seek clarity regarding their obligations under the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. §§ 20501-20511.[1]

To protect the integrity of the electoral process, the NVRA requires each State to "conduct a general program that makes a reasonable effort to remove" from its voter-registration list the name of any person who has moved or passed away. *Id.* § 20507(a)(4). It then subjects States to two seemingly conflicting mandates. It prohibits them from removing a person's name "by reason of the person's failure to vote." *Id.* § 20507(b)(2). And it also prohibits them from removing a person's name on the ground that the person has moved *unless* the person fails to respond to an address-confirmation notice and then also *fails to vote* in the next two consecutive general elections for federal office. *Id.* § 20507(d)(1)(B).

The court of appeals resolved the tension between those two mandates by interpreting the NVRA to categorically prohibit States from considering failure-to-vote data except when expressly required to do so by the NVRA itself. Applying that rule, the court held

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[1] Amici provided timely notice of their intent to file this brief to the parties' counsel of record. *See* Sup. Ct. R. 37.2(a). Amici were not required to seek leave to file this brief. *See* Sup. Ct. R. 37.4.

that the State of Ohio violated the NVRA by using failure-to-vote data to identify registered voters who may have moved, and then sending address-confirmation notices to those voters. According to the court, a State may not use failure-to-vote data as a "trigger" for sending address-confirmation notices.

For the reasons explained below, amici believe the court of appeals misinterpreted the NVRA. But just as important, amici seek clarity regarding the steps they may take to meet their obligation under the NVRA to maintain accurate voter-registration lists. Accordingly, amici respectfully urge the Court to grant Ohio's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

With the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. §§ 20501-20511, Congress sought, among other things, "to protect the integrity of the electoral process" and "to ensure that [States maintain] accurate and current voter registration rolls." 52 U.S.C. § 20501(b)(3)-(4). Advancing those related purposes, the NVRA requires each State to "conduct a general program that makes a reasonable effort to remove" from its voter-registration rolls the name of any person who has moved or passed away. *Id.* § 20507(a)(4). It then gives States instructions about how to conduct their list-maintenance programs. Four of those instructions create the knot that must be untangled here.

(1) The "Failure-To-Vote Clause" provides that a State's list-maintenance program "shall not result in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." *Id.* § 20507(b)(2).

(2) The "Clarification Amendment"—which was added to the NVRA by the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, 1728—provides that "nothing in [the Failure-To-Vote Clause] may be construed to prohibit a State from . . . remov[ing] an individual from the official list of eligible voters if the individual" fails to respond to an address-confirmation notice and then also fails to vote in the next two consecutive general elections for federal office. 52 U.S.C. § 20507(b)(2).

(3) The "Safe-Harbor Process" provides that a State "may" use "change-of-address information supplied by the Postal Service . . . to identify registrants whose addresses may have changed." *Id.* § 20507(c)(1)(A).

(4) And the "Confirmation Procedure" provides that a State "shall not remove the name of a registrant from the official list of eligible voters . . . on the ground that the registrant has changed residence" unless the person fails to respond to an address-confirmation notice and then also fails to vote in the next two consecutive general elections for federal office. *Id.* § 20507(d)(1)(B).

Looking to those four provisions, the court of appeals held that the Failure-To-Vote Clause categorically prohibits States from considering failure-to-vote

data, but also that the Clarification Amendment creates an exception to that prohibition. App.14a-15a, 20a-21a. The exception, according to the court, permits States to consider failure-to-vote data as required by the Confirmation Procedure itself. App.14a-15a, 20a-21a. The court then acknowledged that the NVRA does not mandate the Safe-Harbor Process, and in fact permits the use of other processes to identify registrants who may have moved. App.4a, n.2. But applying its reading of the Failure-To-Vote Clause, the court held that Ohio violated the clause by using failure-to-vote data to identify registrants who may have moved, and then sending address-confirmation notices to those registrants. App.20a-24a. In other words, according to the court, a State may use failure-to-vote data as required by the Confirmation Procedure itself, but may not use that data to trigger the Confirmation Procedure. App.20a-24a.

The Court should grant certiorari for two reasons.

First, the question presented—whether States may use failure-to-vote data to trigger the Confirmation Procedure—is of ongoing importance to the States.

Second, the court of appeals misinterpreted the NVRA. The NVRA does not categorically prohibit States from considering failure-to-vote data. It instead incorporates a statute-specific proximate-cause standard that only prohibits States from removing a person's name from a voter-registration list based *solely* on the person's failure to vote. Indeed, the plain language of both the as-enacted NVRA and the

later-added Clarification Amendment require that reading, as does any clear-eyed review of the relevant legislative history.

ARGUMENT

I. The Court should grant certiorari because the petition raises an important question.

The Court should grant certiorari because the petition raises a question of ongoing importance to the States. Three points make that plain.

First, the question presented will tax the States until the Court answers it. In the last five years, advocacy groups have sued at least nine separate governmental entities for failing to adequately maintain their voter-registration lists.[2] But in just the last two years, other advocacy groups have sued Ohio and Georgia for

[2] *See, e.g.*, Compl., *Judicial Watch, Inc. v. Husted*, No. 2:12-cv-792 (S.D. Ohio filed Aug. 30, 2012), ECF No. 1; Compl., *ACRU v. Walthall Cty., Miss. Election Comm'n*, No. 2:13-cv-86 (S.D. Miss. filed Apr. 26, 2013), ECF No. 1; Compl., *ACRU v. Jefferson Davis Cty., Miss. Election Comm'n*, No. 2:13-cv-87 (S.D. Miss. filed Apr. 26, 2013), ECF No. 1; Compl., *ACRU v. McDonald*, No. 2:14-cv-12 (W.D. Tex. filed Jan. 27, 2014), ECF No. 1; Compl., *ACRU v. Martinez-Rivera*, No. 2:14-cv-26 (W.D. Tex. filed Mar. 27, 2014), ECF No. 1; Compl., *ACRU v. Clark Cty., Miss. Election Comm'n*, No. 2:15-cv-101 (S.D. Miss. filed July 27, 2015), ECF No. 1; Compl., *ACRU v. Noxubee Cty., Miss. Election Comm'n*, No. 3:15-cv-815 (S.D. Miss. filed Nov. 12, 2015), ECF No. 1; Compl., *ACRU v. Montalvo*, No. 7:16-cv-103 (S.D. Tex. filed Mar. 4, 2016), ECF No. 1; Compl., *ACRU v. Snipes*, No. 0:16-cv-61474 (S.D. Fla. filed June 27, 2016), ECF No. 1.

employing list-maintenance programs that allegedly use failure-to-vote data to trigger the Confirmation Procedure,[3] and have threatened to sue other States that employ similar procedures, *see, e.g.*, Letter from Stuart C. Naifeh, Senior Counsel, Demos, to Hon. Tre Hargett, Tenn. Sec'y of State (Oct. 20, 2016), https://goo.gl/lnsfoD. These suits—and their conflicting allegations of voter fraud and voter removal—have taxed the States. They have presented real dollar costs to the States, which have been forced to defend themselves from attacks on two fronts. And they have received substantial media coverage, which has undermined the public's confidence in our electoral process.

Moreover, the States face a real threat of additional litigation. Those States that fail to adequately maintain their voter-registration lists will eventually be embroiled in litigation. But those States that use failure-to-vote data to trigger the Confirmation Procedure face a more immediate threat: The court of appeals' decision will now be used against them. In addition to Ohio and Georgia, at least eleven other States arguably use failure-to-vote data to trigger the Confirmation Procedure: Alaska, Florida, Illinois, Iowa, Missouri, Montana, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and West Virginia.[4] And

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[3] Compl., *Ohio A. Philip Randolph Inst. v. Husted*, No. 2:16-cv-303 (S.D. Ohio filed Apr. 6, 2016), ECF No. 1; Compl., *Common Cause v. Kemp*, No. 1:16-cv-452 (N.D. Ga. filed Feb. 10, 2016), ECF No. 1.

[4] *See* Alaska Stat. Ann. § 15.07.130(a)-(b); Fla. Stat. Ann. § 98.065(2)(c); 10 Ill. Comp. Stat. Ann. §§ 5/4-17, 5/5-24, 5/6-58; Iowa Code § 48A.28(2)(b); Mo. Ann. Stat. §§ 115.181(2), 115.193;

seven others arguably leave open that possibility by delegating to state or local officials the authority to determine what will trigger the Confirmation Procedure: Arkansas, Kentucky, Louisiana, Mississippi, Nevada, North Carolina, and South Carolina.[5] In short, a great deal more litigation is likely. The Court could—and should—prevent the harms that will flow from that additional litigation by granting Ohio's petition and answering the question it presents.

Second, the question presented addresses an ongoing election-integrity issue. As a commission co-chaired by former Presidents Ford and Carter explained, "inaccurate voter lists invite schemes that use 'empty' names on voter lists for ballot box stuffing, ghost voting, or to solicit 'repeaters' to use such available names." Nat'l Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 27 (Aug. 2001), https://goo.gl/BGOq0Y. Yet even in the face of those risks, States struggle to maintain accurate voter-registration lists. According to a 2012 study, about "24 million—one of every eight—voter registrations in the United States are no longer valid or are

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Mont. Code Ann. §§ 13-2-220(1)(c)(iii), 13-2-402(7); Okla. Stat. Ann. tit. 26, § 4-120.2(A)(6), (B); 25 Pa. Cons. Stat. Ann. § 1901(b)(3), (d); R.I. Gen. Laws §§ 17-9.1-26, 17-9.1-27(b); S.D. Codified Laws §§ 12-4-19, 12-4-19.1; Tenn. Code Ann. § 2-2-106(c); W. Va. Code Ann. § 3-2-25(j); *cf.* Kan. Stat. Ann. §§ 25-2316c(d)(2), 25-2354(a) (permitting targeted mailings).

[5] Ark. Const. amend. 51, §§ 10(d)-(e), 11(a)(1); Ky. Rev. Stat. Ann. § 116.112(3); La. Stat. Ann. § 18:193(A); Miss. Code Ann. § 23-15-153(1); Nev. Rev. Stat. Ann. § 293.530(1); N.C. Gen. Stat. Ann. § 163-82.14(a); S.C. Code Ann. § 7-5-330(F)(1).

significantly inaccurate," and about "2.75 million people have registrations in more than one state." The Pew Center on the States, *Inaccurate, Costly, and Inefficient: Evidence That America's Voter Registration System Needs an Upgrade* 1 (Feb. 2012), https://goo.gl/EZZ9J4. Those numbers are startling, and emphasize the importance of the election-integrity question presented by the petition.

Third, the question presented will enable the Court to decide what steps States may take to maintain accurate voter-registration lists. The United States is "one of the most mobile countries in the world." Gallup, *381 Million Adults Worldwide Migrate Within Countries* (May 15, 2013), https://goo.gl/rY9XC5. Indeed, even though Americans are moving at historically low rates, more than 35 million Americans—or 11.2 percent of the population—moved in 2016 alone. *See* U.S. Census Bureau, *Americans Moving at Historically Low Rates* (Nov. 16, 2016), https://goo.gl/ZD77ey. Yet according to the U.S. Postal Service, "[a]s many as 40 percent of people who move do not inform the Postal Service" of that fact. U.S. Postal Serv., Office of the Inspector Gen., Report No. MS-MA-15-006, *Strategies for Reducing Undeliverable as Addressed Mail* 15 (May 1, 2015), https://goo.gl/vOyQDl. Those numbers demonstrate why Ohio's list-maintenance process and those like it are so important to maintaining accurate voter-registration lists. Because so many people fail to submit a change-of-address form to the U.S. Postal Service, the Safe-Harbor Process proves inadequate. Based on the U.S. Postal Service's own data, the Safe Harbor

Process captures, at best, 60 percent of people who move. Ohio's process picks up where the Safe-Harbor Process leaves off, and serves as an effective tool for maintaining an accurate voter-registration list. The Court should take the opportunity offered by the petition to decide whether the NVRA permits Ohio's process and those like it.

II. The Court should grant certiorari because the decision below is obviously wrong.

The court of appeals made a series of small mistakes that culminated in an obviously flawed interpretation of the NVRA. The Court should grant certiorari to correct that obviously flawed interpretation.

A. The court of appeals violated the ordinary-meaning canon.

The court of appeals grounded its interpretation of the Failure-To-Vote Clause in an error by failing to apply the contextually appropriate ordinary meaning of the term "result."

The Failure-To-Vote Clause provides that a State's list-maintenance program "shall not *result in* the removal of the name of any person from the official list of voters . . . *by reason of* the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added).

The court of appeals began its analysis of the clause by defining the term "result." App.20a-21a.

Relying on an out-of-circuit decision that quoted a dictionary definition of the term, the court defined "result" to mean "to proceed or arise as a consequence, effect, or conclusion." App.21a (citation and internal quotation marks omitted).

But that definition fails to capture the proper meaning of the term. The ordinary-meaning canon requires courts to "assume the contextually appropriate ordinary meaning" of a term. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012); *see also Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016) (noting that a word "takes on different meanings in different contexts"). But the court of appeals ignored context. It adopted the definition of the intransitive verb "result," even though the Failure-To-Vote Clause employs the transitive verbal phrase "result in." *See* 52 U.S.C. § 20507(b)(2). And, important here, the transitive verbal phrase does not mean "to proceed or arise as a consequence, effect, or conclusion," but instead means "to cause (something) to happen" or "to produce (something) as a result." *Result in*, *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com (Feb. 4, 2017); *see also Result in*, *Cambridge Phrasal Verbs Dictionary* (2d ed. 2006) (defining "result in" as "to cause something to happen, or to make a situation exist"); *Result in*, *Oxford Dictionary of Phrasal Verbs* (1st ed. 1993) (defining "result in" as to "have (sth) as an outcome or consequence").

Applying the contextually appropriate ordinary meaning of "result," the Failure-To-Vote Clause provides that a State's list-maintenance program "shall

not *result in*"—*i.e.*, cause or produce—"the removal of the name of any person from the official list of voters . . . *by reason of* the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added).

B. The court of appeals violated the prior-construction canon.

The court of appeals then compounded its initial error by substituting the term "result" for the phrase "by reason of," and thus also substituting its own flawed definition of "result" for the Court's prior constructions of "by reason of."

Looking to its own flawed definition of "result," the court held that a State violates the Failure-To-Vote Clause when "removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." App.21a (alterations in original) (citation omitted). The court thus incorporated the boundless but-for or factual causation standard into the clause, and interpreted it to categorically prohibit consideration of failure-to-vote data. *See* App.14a-15a, 20a-21a.

But that interpretation fails to capture the proper meaning of the clause. The court, in fact, rewrote the clause. It inserted its own flawed definition of "result" where the Failure-To-Vote Clause uses the phrase "by reason of." *Compare* App.21a, *with* 52 U.S.C. § 20507(b)(2). That substitution was unexplained and unwarranted. It was also consequential: "result" does not carry the same meaning as "by reason of." The phrase "by reason of" is a term of art that, as this Court

has repeatedly held, incorporates the narrow proximate-cause standard. *See, e.g.*, *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529-36 (1983); *see also Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 221-22 (2012). Because this Court had "settled the meaning of" the phrase before the NVRA was enacted, Congress's "repetition of the same language in" the Failure-To-Vote Clause indicated an "intent to incorporate" that settled meaning. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Accordingly, the court should not have substituted "result" and its own flawed definition of that term for "by reason of," but should have looked instead to this Court's pre-NVRA constructions of "by reason of" and incorporated the proximate-cause standard into the Failure-To-Vote Clause.

Applying the Court's prior constructions of "by reason of," the Failure-To-Vote Clause provides that a State's list-maintenance program "shall not *result in*"—*i.e.*, cause or produce—"the removal of the name of any person from the official list of voters . . . *by reason of*"—*i.e.*, as a proximate cause of—"the person's failure to vote." 52 U.S.C. § 20507(b)(2) (emphasis added).

The proximate-cause standard "is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). Courts have implemented that policy-based judgment with various formulas. *Id.* at 693, 701. Some

have required a "direct relation between the injury asserted and the injurious conduct alleged," and excluded any "link that is too remote, purely contingent, or indirec[t]." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (alteration in original) (citation and internal quotation marks omitted). Others have applied various tests, including "the immediate or nearest antecedent test; the efficient, producing cause test; the substantial factor test; and the probable, or natural and probable, or foreseeable consequence test." *CSX Transp.*, 564 U.S. at 701 (citations and internal quotation marks omitted). And still others have "cut off liability if a 'proximate cause' was not the *sole* proximate cause." *Id.* at 693 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 65, p. 452 (5th ed. 1984) (noting the "tendency . . . to look for some single, principal, dominant, 'proximate' cause of every injury")).

But under any of the various formulations of the standard, Ohio's list-maintenance process does not "result in" (*i.e.*, cause or produce) the removal of a person's name from the official list of voters "by reason of" (*i.e.*, as a proximate cause of) that person's failure to vote. Removal is not, for instance, *directly related* to a person's failure to vote, because it is *more closely related to* and *purely contingent upon* a person's failure to respond to the address-confirmation notice sent as part of the Confirmation Procedure. A person's failure to respond to the address-confirmation notice is, in other

words, the *immediate* and *nearest antecedent* of removal, and a person's failure to vote is in any event not the *sole* proximate cause of removal.

C. The court of appeals violated the interpretive-harmony canon.

Viewed from a different perspective, the court of appeals' failure to apply the ordinary-meaning and prior-construction canons caused it to violate the interpretive-harmony canon.

The court recognized that interpreting the Failure-To-Vote Clause to categorically prohibit consideration of failure-to-vote data led to a conflict because the Confirmation Procedure affirmatively requires consideration of failure-to-vote data. *See* App.14a-15a. The court attempted to resolve that conflict by pointing to the Clarification Amendment. It held that, "under the [Clarification Amendment's] plain language," the Confirmation Procedure "is permissible even though the confirmation notice procedure itself involves consideration of a registrant's failure to vote." App.15a.

But that line of reasoning contains an obvious flaw: it is anachronistic. As enacted in 1993, the NVRA included both the Failure-To-Vote Clause and the Confirmation Procedure. *See* National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77, 83-84. The Clarification Amendment, however, was not introduced into the NVRA until 2002. *See* Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, 1728. Accordingly, under the court's reading, from 1993 until

2002, the Failure-To-Vote Clause categorically prohibited conduct that the Confirmation Procedure affirmatively required, and the conflict between those two provisions was open and irreconcilable.

Of course, there could not have been an open and irreconcilable conflict between the Failure-To-Vote Clause and the Confirmation Procedure from 1993 to 2002. No court would have knowingly permitted that result because, when interpreting a statute, the "task is to fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959). The court of appeals did not attempt to fit all parts of the as-enacted NVRA into an harmonious whole. To the contrary, it needlessly rendered the Failure-To-Vote Clause in conflict with the Confirmation Procedure. It could have—and should have—employed the prior-construction canon to incorporate the proximate-cause standard into the Failure-To-Vote Clause, because with that standard incorporated, the Failure-To-Vote Clause rests harmoniously alongside the Confirmation Procedure. Indeed, even within the Confirmation Procedure, removal is not *directly related to* a person's failure to vote, because it is *more closely related to* and *purely contingent upon* a person's failure to respond to the address-confirmation notice, and a person's failure to vote is in any event not the *sole* proximate cause of removal.

Moreover, if the court had honored the interpretive-harmony canon by incorporating the proximate-cause standard into the Failure-To-Vote Clause, it would

have reached a different result in this case. That follows because, as demonstrated above, Ohio's list-maintenance process does not result in (*i.e.*, cause or produce) the removal of a person's name from the official list of voters "by reason of" (*i.e.*, as a proximate cause of) that person's failure to vote. *See supra* pp. 12-14.

D. The court of appeals interpreted a proviso as if it were an exception.

The court of appeals' reliance on the Clarification Amendment to resolve the supposed conflict between the Failure-To-Vote Clause and the Confirmation Procedure led to an additional error: the court interpreted the Clarification Amendment as an exception to a general prohibition when in fact it is a proviso that modifies that prohibition.

Although "there are a great many examples where the distinction is disregarded and where the words are used as if they were of the same signification," there is a "technical distinction between an exception and a proviso." *United States v. Cook*, 84 U.S. 168, 177 (1872) (footnote omitted). "A true statutory exception exists only to exempt something which would otherwise be covered by an act." 2A *Sutherland Statutory Construction* § 47:11 (7th ed.). Provisos, by contrast, function as rules of construction and are thus "commonly used to limit, restrain, or otherwise modify the language of the enacting clause." *Quackenbush v. United States*, 177

U.S. 20, 26 (1900); Scalia & Garner, *supra*, at 154 (noting that a proviso "modifies the immediately preceding language").

The court of appeals failed to recognize that technical but important distinction. Although the court referred to the Clarification Amendment as both a proviso and an exception, App.14a-19a, it never considered the possibility that the amendment functions as a rule of construction, and instead interpreted and applied it as if it were an exception to a general prohibition, App.18a, 20a.

That mistake was easy to make. The Clarification Amendment begins with the phrase "except that," 52 U.S.C. § 20507(b)(2), which suggests that the amendment should be read as an exception to a general prohibition. But the phrase misleads. In fact, because poor drafting is common, the "particular form of the words used to introduce the applicable provision generally does not determine whether it should be classed a proviso or an exception." 1A *Sutherland Statutory Construction* § 21:11 (7th ed.). Instead, the function of a provision determines whether it is a proviso or an exception.

By that standard, the Clarification Amendment rests comfortably in the proviso camp. Its plain language confirms that it functions as a rule of construction. It provides that "nothing in [the Failure-To-Vote Clause] *may be construed* to prohibit" certain conduct. 52 U.S.C. § 20507(b)(2) (emphasis added). In addition, the amendment was plainly intended to be a rule of

construction that clarified the meaning of the Failure-To-Vote Clause. As enacted, the heading that preceded the amendment read, "*clarification* of ability of election officials to remove registrants from official list of voters on grounds of change of residence." Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666, 1728 (emphasis added) (capitalization omitted); *see also* H.R. Rep. No. 107-730, pt. 1, at 81 (2002).

That reading is also confirmed by the Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988). In *DeBartolo*, the Court interpreted a provision that, like the Clarification Amendment, included a "shall not be construed" command. 485 U.S. at 582. The Court rejected an interpretation that treated "the proviso as establishing an exception to a prohibition that would otherwise reach the conduct excepted." *Id.* It noted that the proviso had "a different ring to it" because it included the "shall not be construed" command. *Id.* Then, consistent with the argument made above, the Court interpreted the proviso as a "clarification" of a general ban "rather than an exception to a general ban." *Id.* at 586. That line of reasoning applies here as well.

If the court of appeals had properly interpreted the Clarification Amendment as a proviso, it would have reached a different result in this case. If nothing else, the Clarification Amendment clarifies that the Failure-To-Vote Clause *does not* categorically prohibit consideration of failure-to-vote data. There is, moreover, a refreshing and reassuring regularity here. The

prior-construction canon, the interpretive-harmony canon, and a proper interpretation of the Clarification Amendment each require the same interpretation of the Failure-To-Vote Clause. That is, they each require that the clause be interpreted to incorporate the proximate-cause standard. *See supra* pp. 11-19. And as already demonstrated, under any of its various formulations, the proximate-cause standard requires a different result in this case. *See supra* pp. 12-14.

But now take one step further. The Court has recognized that common-law formulations of the proximate-cause standard varied, *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693, 701 (2011), but also that the standard is sometimes statute-specific, *id.* at 700; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) ("Proximate-cause analysis is controlled by the nature of the statutory cause of action."). Is there reason to believe that the Failure-To-Vote Clause embodies a statute-specific proximate-cause standard? Absolutely.

The Failure-To-Vote Clause does not prohibit—and per the Clarification Amendment may not be construed to prohibit—a State from considering a person's failure to vote if the State also considers the person's failure to respond to an address-confirmation notice. That is, after all, the Confirmation Procedure. The Failure-To-Vote Clause thus only prohibits—and per the Clarification Amendment may only be construed to prohibit—a State from relying *solely* on failure-to-vote data. That reading is consistent with the common-law formulation of the proximate-cause

standard that "cut off liability if a 'proximate cause' was not the *sole* proximate cause," *CSX Transp.*, 564 U.S. at 693 (citation omitted), and is confirmed by the HAVA, which expressly states the proximate-cause standard in those terms: "no registrant may be removed *solely by reason of* a failure to vote," 52 U.S.C. § 21083(a)(4)(A) (emphasis added); *see Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (noting that the *in pari materia* canon provides that statutes that "pertain to the same subject" should be read "as if they were one law" (citation omitted)). In addition, Congress enacted the Failure-To-Vote Clause to prohibit States from removing registrants from the official list of registered voters based *solely* on their failure to vote. As the legislative history demonstrates, the clause was intended to "prohibit states from removing registrants from the list simply for not voting." H.R. Rep. No. 103-9, at 30 (1993); *see also* S. Rep. No. 103-6, at 46 (1993).

In sum, the Failure-To-Vote Clause incorporates a statute-specific proximate-cause standard that prohibits a State conducting a list-maintenance program from relying *solely* on failure-to-vote data. That is the prohibition.

E. The court of appeals misapplied the surplusage canon.

One last point. The court of appeals repeatedly insisted that interpreting the Failure-to-Vote Clause to prohibit only those list-maintenance programs that fail to comply with the Confirmation Procedure "would

reduce the . . . clause to mere surplusage." App.17a; *see also* App.17a-18a, 23a. But that is simply false. The Confirmation Procedure governs *only* when a State removes a registrant's name from its voter-registration list "on the ground that the registrant has changed residence." 52 U.S.C. § 20507(d)(1). When a State removes a registrant's name based on other criteria, *see, e.g.*, *id.* § 20507(a)(4)(A) (death), the NVRA does not require the Confirmation Procedure, and the Failure-To-Vote Clause stands alone as a prohibition on removing the registrant's name based solely on failure-to-vote data. Moreover, even if that were not true, the surplusage canon "cannot always be dispositive because (as with most canons) the underlying proposition is not *invariably* true." Scalia & Garner, *supra*, at 176. That follows because "drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." *Id.* at 176-77. The court of appeals' analysis, then, was driven by an improper application of, and an improper understanding of, the surplusage canon.

CONCLUSION

The Court should grant Ohio's petition.

Respectfully submitted,

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